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IN THE

Supreme Court of the United States

October Term, 1964

No. 801

EDWARD WARD, CHARLES CAGE, WILLIAM CHEVALIER, and EARL DAVIS,

Petitioners,

—v.—

LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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LOUISIANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana, entered in the above-entitled case on July 1, 1964, rehearing of which was denied October 7, 1964.

Citation to Opinion Below

The opinion of the Supreme Court of Louisiana is reported at 167 So. 2d 359.

Jurisdiction

The judgment of the Supreme Court of Louisiana affirming petitioners' convictions and sentences was entered on July 1, 1964, and rehearing was denied October 7, 1964.[1]

[1] In the certified record the notation "Rehearing refused October 7, 1964," appears stamped on p. 6 of the opinion below and also on the last page of the application for rehearing which is attached to the opinion below in the certified record.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below, and asserting here, the deprivation of rights, privileges, and immunities secured to them by the Constitution of the United States.

Questions Presented

1. Whether the rights of petitioners Ward, Cage, Chevalier and Davis under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States were violated at their trial for the crime of murder in a Louisiana court where the prosecutor excluded all Negroes from jury service by using peremptory challenges on the basis of race?

2. Whether the rights of petitioners Cage, Chevalier and Davis under the due process clause of the Fourteenth Amendment to the United States Constitution were violated in that they were convicted of murder on a record containing no evidence of their guilt and no evidence that they participated in, had prior knowledge of, or were able to prevent any act of violence toward the alleged murder victim?

Constitutional Provisions and Statutes Involved

1. Section I of the Fourteenth Amendment to the Constitution of the United States.

2. Louisiana Statutes Annotated, Constitution, Art. 1, §10 (Constitution, Volume 1, p. 153):

> §10. *Criminal prosecutions; information as to accusation; peremptory challenges*
>
> Section 10. In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusa-

tion against him; and when tried by jury shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law.

3. Louisiana Revised Statutes Annotated, R. S. 15:354 (Volume 11, p. 117):

§354. *Number of peremptory challenges allowed*

In all trials for any crime punishable with death, or necessarily with imprisonment at hard labor, each defendant shall be entitled to challenge peremptorily twelve jurors, and the prosecution twelve for each defendant. In all other criminal cases each defendant shall have six peremptory challenges and the state six for each defendant.

4. Louisiana Revised Statutes Annotated, R. S. 14:24 (Volume 9, p. 86):

§24. *Principals*

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime are principals.

5. Louisiana Revised Statutes Annotated, R. S. 14:30 (Volume 9, p. 352):

§30. *Murder*

Murder is the killing of a human being.

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson,

aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of murder shall be punished by death.

Statement

Petitioners Edward Ward, Charles Cage, William Chevalier and Earl Davis were indicted on March 5, 1963, and charged with murdering one John Fisher on or about November 11, 1962 (R. 28). Petitioners were tried together before a jury in the Tenth Judicial District Court, Parish of Natchitoches, Louisiana on April 1-6, 1963. On April 6, 1963, petitioner Edward Ward was found "guilty as charged" and petitioners Cage, Chevalier and Davis were found "guilty as charged without capital punishment" (R. 24, 28). Edward Ward was sentenced to suffer the death penalty by electrocution (R. 26). William Chevalier, Earl Davis and Charles Cage were sentenced to confinement in the state penitentiary at hard labor for life (R. 26).

Petitioners appealed to the Supreme Court of Louisiana which affirmed in an opinion filed July 1, 1964. Rehearing was denied October 7, 1964. The Supreme Court of Louisiana stayed the execution of its judgment as to petitioner Ward for a period of 90 days from October 7, 1964, to enable petitioners to seek review in this Court.

The evidence adduced at the trial is summarized below.

On November 10, 1962, Northwestern College located in Natchitoches, Louisiana was having its Homecoming Celebration (R. 359). After a football game that day, a party was held at the apartment of five students from that college, one of whom was John Fisher (R. 354). The party started

in the early evening and there were numerous guests (R. 342, 354). Liquor was served and most of the male guests were drinking (R. 190, 351). James Larry Weeks came to this party at about midnight and there met Daniel J. Brupbacher (R. 129). According to the testimony of Weeks, Brupbacher was intoxicated (R. 155, 190). They decided to go to the Circle Cafe, which was located about one block from Fisher's apartment, to get some food (R. 130).

With their arms around each other, Brupbacher and Weeks walked down the street to the Circle Cafe (R. 155). Brupbacher was talking loudly and cursing (R. 156).[2] As they approached the Circle Cafe, they observed a group of Negro boys and men standing in front of the colored entrance (R. 156, 263). Weeks told Brupbacher to quiet down (R. 156). Three of the young men in front of the Cafe were petitioners Charles Cage, William Chevalier and Earl Davis. A fourth boy was W. C. Courtney (R. 802). These four young boys were emerging from the colored section of the Cafe (R. 802). Previously, they had been out driving a car borrowed from petitioner Edward Ward, for whom Chevalier, Cage and Davis worked (R. 736, 871).

Weeks testified that as he and Brupbacher approached the young Negro boys, he bumped into Chevalier (R. 158, 263, 740). Edward Ward testified that Chevalier was under the impression that it had been done intentionally (R. 872). Heated words were exchanged between Weeks and Brupbacher and some of the young Negro boys (R. 740, 802). Weeks and Brupbacher began backing toward the door of the Circle Cafe (R. 159, 263). At that time, a group of white men emerged from the Circle Cafe and came to the rescue of Weeks and Brupbacher (R. 171).

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[2] Testimony of Weeks.

Charles Cage, Earl Davis, William Chevalier and W. C. Courtney began to run (R. 168). Courtney was separated from petitioners Chevalier, Cage and Davis who fled toward the car of petitioner Ward (R. 168). Courtney picked up a stone lying in the street and, as he fled, hurled it at Brupbacher and Weeks (R. 159, 162). The stone missed both of them; ricocheted from the door of the Circle Cafe; and fell onto the sidewalk (R. 162). Weeks, emboldened by the presence of the newly arrived whites, went in pursuit of petitioners, who had fled to their car (R. 162, 169, 172). Weeks stated that as they drove past, he picked up the rock which Courtney had thrown and hurled it through the windshield of the car in which the three petitioners were attempting to escape (R. 132, 169). Petitioner Chevalier, who was driving, was cut on the side of the head (R. 804).

W. C. Courtney ran into the colored section of the Circle Cafe (R. 166). Weeks, who testified that he was by this time enraged, went with his friends in pursuit of Courtney (R. 162, 167, 233). He was stopped at the entrance of the Circle Cafe by the waitress (R. 226). The police were called and arrived shortly afterwards. Weeks described what had occurred to the officers (R. 388). They arrested Courtney and took him to the police station "pending" the swearing out of a warrant by Weeks (R. 389).

Weeks and Brupbacher ate at the Cafe and eventually returned to the party around 1:00 p.m. on the morning of November 11, 1962.

Meanwhile, petitioners Chevalier, Cage and Davis were looking for Ward. Cage testified that they were concerned about the damage to Ward's car, a 1956 Buick, and had decided that they would pay for the damage to it (R. 818). Eventually, they located Edward Ward at the Casa Grande Club, some distance from the scene of the incident (R. 819).

Cage and Davis were too young to enter the Club, so William Chevalier went in alone (R. 744, 820).

Ward stated that Chevalier approached him in the Casa Grande Club and told him of the damage and of the boys' intention to pay for it (R. 872). Noticing the cut on Chevalier's head, Ward began to question him more closely as to what had happened. Chevalier explained and the two went outside to where Cage and Davis were waiting and there talked further of the incident (R. 873). Ward testified that he was angered by what had been done to the boys and to his car (R. 875). He testified also that he told the boys to get into the second of his cars, a white 1960 Ford Station Wagon, and to wait there for him (R. 805, 873). He stated at trial that it was his intention to go and see about the damage (R. 875). The boys started toward the Ford Station Wagon (R. 805). Ward returned alone to the Casa Grande Club to take leave of his friends there and explain his mission (R. 805, 873).[3] Ward testified that he was counseled by various people in the Club of the danger of approaching an unruly crowd of white men without any protection (R. 873, 875). He stated at trial that because of their advice he procured a gun from the owner of the club (R. 874). Ward testified that he then approached the car in which the boys were waiting and, as he did so, held the gun close to himself, concealing it from their vision (R. 874-5). He testified also that on getting into the car, he slipped the gun under the driver's seat out of the sight of petitioners Chevalier, Cage and Davis (R. 874). Ward did not intend that the boys see the gun, and, they did not, in fact, see it (R. 746, 808).[4]

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[3] Testimony of Charles Cage and Edward Ward.

[4] Testimony of Charles Cage and Earl Davis

Ward began to drive toward the scene of the incident in which the car was damaged (R. 806-7, 876-7).

Shortly after Weeks and Brupbacher returned to the party, a violent scene erupted. Donald Bates, one of the guests at the party, began to quarrel with and make unseemly remarks to and about his date, Gloria Millington (R. 138-9, 177-8). John Fisher told Bates that he would not tolerate such conduct in his house and asked him to leave. This Bates refused to do. A struggle resulted when Fisher attempted to force Bates from his apartment (R. 138-9, 176). The struggle resulted in Fisher's bodily carrying Bates from the apartment (R. 139). Many of the men at the party accompanied the struggling pair as they went from the apartment into the street (R. 140, 268). One of this group was Brupbacher (R. 140, 268).

At that moment, Ward and the boys were approaching the corner on which the crowd from the party was standing (R. 877). Ward was heading for the Circle Cafe (R. 877). Ward testified that on sighting the group of white men, he asked the boys whether these were the men who had damaged the car (R. 877-8). See also R. 808. They replied that they thought it was some of the men (R. 808, 878).[5] Ward pulled his car abreast of the group. Ward, Cage and Davis all testified that someone from the group ran towards the car in a threatening manner (R. 749, 808, 841, 878). Ward testified that the man challenged him with the statement, "You black son-of-a-bitch. Do you want to fight?" (R. 878). Ward, Cage and Davis testified that Ward responded, "Yes, I'll fight, goddammit," and reached under the seat, grabbed the gun and fired two shots at the approaching man (R. 749-50, 808, 879; see also R. 335). Ward, Cage and Davis testified that they did not recognize

[5] Testimony of Charles Cage and Edward Ward.

who the approaching man was and that they were not aware of the consequences of the firing (R. 755, 809, 879). They drove off (R. 843).

John Fisher, who was standing in the crowd on the street, was killed by one of the shots. Subsequently Ward and the three boys were arrested and indicted for the murder of John Fisher. The three boys were indicted for murder as principals on the theory that they aided and abetted Edward Ward in the killing (R. 100, 105).

After trial petitioners filed a motion for new trial setting forth as one ground that:

> . . . all of those members of your defendants' race who were interrogated as prospective jurors, who did not disqualify themselves, were pre-emptorily challenged by the District Attorney and consequently no member of their race was on the jury that convicted them (R. 963).

The court overruled the motion (R. 25). The objection was reiterated in a bill of exceptions before the trial court (R. 1072-73). Apparently the district attorney did not contest the factual assertion by petitioners, and the trial judge, assuming the truth of the allegation, ruled in a *per curiam* that:

> The State, in excusing negroes from service on the jury was exercising and utilizing pre-emptory challenges, which it had a right to do (R. 1075).

On appeal the Supreme Court of Louisiana held that no rights of petitioners under the Fourteenth Amendment to the Constitution of the United States had been violated, stating:

The defendants contend that the district attorney's peremptorily challenging of members of the Negro race denied to them their constitutional rights because it constituted a systematic exclusion of Negroes from the petit jury which tried them. Defendants offered no proof whatever of these allegations, and for all intents and purposes this should end the matter. But their allegations, even if accepted as true, would not show a violation of their constitutional rights so as to entitle them to a new trial.

The right of peremptory challenge is guaranteed to an accused by the Constitution of this state, Art. 1, Sec. 10, and the number of peremptory challenges to the State and to the defendant is fixed by statute, La. Code Crim. Proc. Art. 354. The right of peremptory challenge is a right not to select, but to reject, and this right of rejection may be exercised without assignment of any cause or reason or inquiry into the motive. It was said many years ago by this court that neither the State nor the defendant has any right to complain of peremptory challenges tendered by the other. See State v. Durr, 39 La. Ann. 751, 2 So. 546 (p. 6a, Appendix).

The court below also relied on *United States ex rel. Dukes* v. *Sain*, 297 F. 2d 799 (7th Cir. 1962), stating that the defendant in that case "complained there, as do the defendants in this case, that the state's attorney had used his peremptory challenges to exclude all Negroes from the jury which tried him, thereby denying him due process and equal protection of the laws" (p. 7a, Appendix).

The claim that there was no evidence to support the conviction of petitioners Cage, Chevalier and Davis was made in the motion for new trial, asserting (R. 964):

That the verdict is contrary to the law and evidence:

* * * * *

b. As to your defendants, Charles Cage, William Chevalier, and Earl Davis, in that the testimony shows that neither of them fired the pistol, that they did not know that Edward Ward even had a pistol or gun of any kind, and that there was no conspiracy to kill existing between them.

The objection was reiterated in a bill of exceptions presented to the trial court (R. 1073). The trial court's *per curiam* apparently did not discuss this contention as its remarks seemingly refer only to petitioner Edward Ward.[6]

On appeal, petitioners argued the same point (see Brief of Appellants in Supreme Court of Louisiana, pp. 7, 17).[7] The Supreme Court's opinion, however, made no mention of this argument.

Thus while petitioners Cage, Chevalier and Davis plainly claimed that they were convicted on a record containing no evidence of their guilt, the no evidence claim was not specifically related by their motion to the due process

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[6] The court apparently referring only to Ward, said:

"This court, after hearing the testimony and the evidence, finds that testimony worthy of belief does not substantiate the defendant's version of what transpired, and this court is of the opinion that the verdict of the jury is completely justified by the evidence adduced at the trial and is in accordance with the law of this State" (R. 1075-76).

[7] The brief in the court below argued at p. 17 that:

"We further urge the Court that the verdict in this case is contrary to the law and evidence. The record will show such facts as to conclusively prove that Edward Ward was provoked to the extent as to remove the killing by him of John Fisher from the category of murder to that of manslaughter, and *it will also show beyond any reasonable doubt that the other three defendants, who are fuzzy-faced boys, were guilty of no crime in connection with the killing.*" (Emphasis supplied.)

clause of the Fourteenth Amendment. But it is submitted that where a no evidence claim—inherently a matter of due process—is plainly presented, it should not matter that the pleading filed makes no specific reference to the due process clause. Indeed, the form of the motion for new trial in this case, which alleged that the verdict was contrary to the law and evidence and then made the no evidence claim by reference to the facts, is very similar to the motion for new trial filed in *Garner* v. *Louisiana*, 368 U. S. 157 (*Garner* record, pp. 39-40). The motion in the *Garner* case did, in a separate paragraph, mention the Fourteenth Amendment and generally assert a denial of due process. But in the *Garner* motion there was no articulated connection between the no evidence claim in one paragraph and the general reliance on the due process clause in another. And, of course, as this Court noted in *Garner*, a claim that there is no evidence to support a conviction presents an issue of law reviewable by the Supreme Court of Louisiana (368 U. S. at 161, n. 6).

REASONS FOR GRANTING THE WRIT

I.

This Petition Presents Issues Similar to Those Pending Before This Court in Another Case in Which Certiorari Has Been Granted.

This petition presents the issue of the propriety, under the equal protection clause of the Fourteenth Amendment, of a state prosecutor's use of peremptory challenges to exclude Negroes, because of race or color, from service on a jury trying a criminal case involving Negro defendants. The Supreme Court of Louisiana held that even if it was shown that the peremptory challenge was being used systematically to exclude Negroes from serving on juries, this "would not [be] a violation of [defendants'] constitutional rights so as to entitle them to a new trial" (p. 5a, Appendix).

In the case of *Robert Swain* v. *Alabama,* No. 64, October Term, 1964, argued December 8, 1964 (33 U. S. L. Week 3216), one of the questions before this Court is whether a state may use peremptory challenges systematically to exclude Negroes from jury service. The *Swain* case has not yet been decided.

Since one of the questions presented in this petition is similar or identical to a question raised in another petition which has been granted and is pending before this Court, the issue is assumedly of such importance that it would merit the granting of this petition by this Court. Compare *Trustees of Monroe Ave. Church of Christ* v. *Perkins,* 334 U. S. 813, with *Shelley* v. *Kraemer,* 334 U. S. 1.

II.

The Public Prosecutor's Racial Use of Peremptory Challenges to Exclude Negroes From Jury Service Violated Petitioners' Rights to Due Process and Equal Protection of the Laws.

This Court has held in an unbroken line of cases since *Strauder* v. *West Virginia,* 100 U. S. 303, that the systematic exclusion of Negroes from jury service violated the Fourteenth Amendment rights of defendants in criminal cases. The rule is not qualified by the form or the perpetrator of the exclusion (*Eubanks* v. *Louisiana,* 356 U. S. 584, 587), and the Constitution is violated "by *any action of a state,* whether through its legislature, through its courts, or through its executive or administrative officers" which results in the exclusion of Negroes "*from serving*" on juries. *Carter* v. *Texas,* 177 U. S. 442, 447 (emphasis supplied); *Norris* v. *Alabama,* 294 U. S. 587, 589.

This case presents the question whether, in practice, the settled rules against jury discrimination can be totally avoided by the states through the public prosecutor's use of peremptory challenges on a racial basis. The resolution of this question will effectively determine whether the right declared in *Strauder,* and ever since, will be anything more than a theoretical right in areas which resist the doctrine. It is quite plain that in most communities, given a sufficiently large number of peremptory challenges by the legislature[8] and an absolute discretion to use them on a racial basis, a public prosecutor can indeed prevent Negroes from serving on criminal juries.[9]

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[8] See LSA-R.S. 15:354 (Vol. 11, p. 117), *supra,* p. 3.

[9] The United States Civil Rights Commission noted the problem:

> "[A]s the more obvious practices of excluding racial groups from juries have been outlawed, they have gradually been

The court below viewed the peremptory challenge as granting such an absolute discretion to the prosecutor (as well as to the defendant), and viewed the law as "precluding inquiry into the motives or mental attitudes of the one to whom the right is given" (p. 6a, Appendix). Petitioners submit that this absolutist view of the law as to peremptory challenges too greatly restricts the impact of the Fourteenth Amendment upon public officials. The Amendment places limitations on the conduct of state officers even in areas where they normally exercise wide discretion and power. For example, this Court said in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 344-345, that, "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." (*Id.* at 364 U. S. 347.)

Petitioners submit that, if the rule against jury discrimination is to be meaningful, the principle that peremptory challenges (as used by state officers) may be exercised for

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supplanted by more subtle means. One of these more sophisticated methods already mentioned is the summoning of Negroes for jury service without placing them on the panels; the Negroes are summoned but never sit. Another method used to keep Negroes off a petit jury is agreement between counsel. The staff learned from a number of white attorneys and a Federal judge in Alabama in March 1961, that the prosecution (sometimes even the local United States Attorney) and defense counsel frequently agree to challenge any Negroes who appear on petit jury panels. And one State judge in the Birmingham area was reported to ask counsel as a matter of custom at the beginning of criminal proceedings: 'Gentlemen, I presume you wish to exclude any Negroes from the jury.'" (Vol. 5, 1961 U. S. Commission on Civil Rights Report, p. 99.)

any reason must be subjected to the qualification that they cannot be used on a racial basis to exclude Negroes *qua* Negroes from jury service. As Mr. Justice Frankfurter wrote in *Gomillion* v. *Lightfoot, supra:*

> Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.

The grant of peremptory challenges to the State is subject to restriction "by the necessity of having an impartial jury" and the "constitutional right of the accused" under the Fourteenth Amendment. *Hayes* v. *Missouri,* 120 U. S. 580. The State cannot grant any of its agents (the prosecutor included) power to use juries unrepresentative of the community so as to distort "basic concepts of a democratic society and a representative government." *Smith* v. *Texas,* 311 U. S. 128, 130.

That the type of discrimination practiced here is sophisticated and not easy to detect is all the more reason that it should be condemned unequivocally. As Judge Edgerton wrote in a dissenting opinion in *Hall* v. *United States,* 168 F. 2d 161, 166 (D. C. Cir. 1948), cert. den. 334 U. S. 853, "The rule against excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury."

Although the Supreme Court of Louisiana found that petitioners had not offered proof that Negroes were systematically excluded by use of the State's peremptory challenges, the Court chose to disregard this conclusion, exercised its discretion and decided petitioners' constitutional

claim as if the allegations with respect to use of peremptory challenges were true.[10] In denying petitioners' claim on the merits, the Supreme Court of Louisiana broadly approved unrestricted use of peremptory challenges even if the State thereby systematically excludes Negroes from jury service. Such delineation of the constitutional obligations of prosecuting attorneys, in a state where persistent exclusion of Negroes from jury service is a flagrant violation of the Constitution and decisions of this Court, clearly presents a question of gravity for consideration of this Court on writ of certiorari.

III.

Petitioners Cage, Chevalier and Davis Were Convicted of Murder on a Record Containing No Evidence of Their Guilt in Violation of the Due Process Clause of the Fourteenth Amendment.

Petitioners Cage, Chevalier and Davis were tried, convicted and sentenced to life imprisonment under an indictment charging that they did:

> . . . on or about the 11th day of November in the year of Our Lord One Thousand Nine Hundred and Sixty-Two, . . . unlawfully murder John Fisher, contrary to the form of the Statute of the State of Louisiana . . . (R. 93-94).

They were prosecuted on the theory that they aided and abetted Edward Ward in the slaying, it never having

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[10] Petitioners' constitutional claim is, therefore, squarely presented to this Court for review, *Coleman* v. *Alabama*, 377 U. S. 129, 133.

been asserted that either of these three petitioners shot or in any way harmed the victim.[11] The indictment charging petitioners as principals is authorized by LSA-R.S. 14:24, quoted *supra* at p. 3.[12]

Under the Louisiana decision, "aiding and abetting" means the active and knowing participation of a defendant in the criminal act of another person. *State* v. *Poynier,* 36 La. Ann. 572 (1884); *State* v. *Rodesta,* 173 La. 623, 138 So. 124 (1931); *State* v. *Sims,* 197 La. 347, 1 So.2d 541 (1941); *State* v. *Capaci,* 179 La. 462, 154 So. 419 (1934).

The record in this case contains no evidence of any active and knowing participation by Chevalier, Cage and Davis in the killing of John Fisher. Indeed, all of the evidence is to the contrary. Briefly characterized, the evidence merely established that Cage, Chevalier and Davis were present in an automobile driven by Ward when the latter shot John Fisher. But there was no evidence that any of the three alleged aiders and abetters knew of or had any reason to know either that Ward had a weapon or that he would use it. Neither is there any evidence that either of these three young boys encouraged Ward to shoot Fisher or actually participated in the shooting.

All of the evidence about the involvement of Cage, Chevalier and Davis will be summarized below. They are young

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[11] That the prosecution case rested on an aiding and abetting theory is clear from the district attorney's opening and closing statements (R. 106-8; 923).

[12] In 1932 Louisiana "sought to simplify its criminal law and procedure by abolishing the common law distinction between principals and accessories before the fact." (LSA-R.S. 14:24, Reporter's Comment.) However, this change has no real bearing on petitioners' cases, for their presence at the scene of the slaying was admitted. Even at common law persons who were present at the commission of a felony and who aided, assisted or encouraged the commission of felony were considered principals.

boys.[13] On the night of November 10, 1962, they had borrowed and were using the car of petitioner Edward Ward who was Charles Cage's uncle (R. 736, 831). They became involved in a slight incident with several white men which resulted in the breaking of the windshield of their borrowed car (R. 132, 162, 169). Worried about the damage to the car, they sought Edward Ward with the intention of paying and did in fact offer to pay Edward Ward for the damage (R. 818, 872). Ward ordered them into another car which he owned and they obeyed and went to the car (R. 805, 873); Ward then entered a nearby cafe and was there counseled to and did procure a gun (R. 873-75); Ward concealed the gun from the sight and knowledge of petitioners Cage, Chevalier and Davis.[14] None of these

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[13] At trial Davis was 19 (R. 733), Cage was 18 (R. 799) and Chevalier was described as a "youngster" (R. 870).

[14] Testimony of petitioner Edward Ward on direct examination (R. 874-75):

"I got into the car—in the meantime I had the revolver in my right hand, at my side, and I opened the door of the stationwagon and got in and I just put it under the seat.

* * * * *

"Q. Now, did you show any of these boys that gun? A. No, Sir. There may have been a possibility of Bill [William Chevalier] seeing the gun.

Q. Insofar as you know, did any of them see the gun? A. I couldn't truthfully say.

Q. Yes, or no, you don't know whether they did or not? A. I'm almost positive—it would have almost been impossible, not only impossible for the boys in the back seat [Cage and Davis] to see me get in with something and slide down like I did.

Q. Did you—were you showing the gun around then? A. No, Sir."

On cross-examination petitioner Ward testified (R. 885-86):

"A. No, Sir, I got in the car—do you want me to give you a demonstration?

Q. Yes. A. I approached the vehicle in this manner. This is the driver's seat; this is my car right here; this is the door; I hugged the gun to my body like this. The door on a Ford is a pushbutton. You push the button to open the door. I

petitioners knew that Ward had a gun or any instrument of violence.[15] Petitioners knew only that Ward was going

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slid right in and shoved the gun under the seat just like—all in one motion of getting into the automobile.

Q. Now, was that between your legs then that you—under the seat—or was it to the left side? A. It couldn't be specifically to my—it couldn't be to my left if I was going into the car from the right, but whether I put it between my legs—I would say it would be to the right of my right leg.

Q. To the right of your right leg. Well, that, then would have placed the gun between you and Chevalier would it not? A. Yes, it would, to a certain extent. But there is a transmission housing that's located in the vehicle. It doesn't make that Chevalier would have to see me have the gun in there. Knowing that I had put it in there, I don't know that he could state that I positively put a gun in there, or what."

[15] On direct examination, petitioner Cage testified (R. 807-09):

"A. Well, when we got to the intersection of Lafayette and Second Streets, these boys were standing on the corner.

Q. White or colored? A. They was white.

Q. All right, go ahead. A. At that time my uncle asked if that was the boy involved in the rock-throwing incident, and we said we believe it was, . . . And the boys looked around, and one of them started saying something and started walking towards the car. I can't recall what he said, because the window was rolled up in the back, and I couldn't understand what he had—what he was saying, and at that time, I heard my uncle say, 'Yes, I'll fight you.' And . . .

Q. Go ahead. A. And then, that's when I seen the gun. He had picked the gun up.

Q. Now, when you say, 'He had picked the gun up,' who do you mean picked the gun up? A. My uncle, Edward Ward.

Q. Had you seen the gun before? A. No, Sir.

Q. Did you know your uncle had the gun until then? A. No, Sir.

Q. Were you living with your uncle and your aunt on Fifth Street? A. Yes, Sir. I was.

Q. Had you ever seen a gun in his home? A. No, Sir.

Q. Had you ever seen a gun in his car? A. No, Sir.

Q. Had you ever seen him with a gun any time any place until you saw him pull the gun then? A. No, Sir.

Q. That's the first time you knew he had the gun? A. Yes, Sir."

Petitioner Davis testified on cross-examination (R. 749-50):

"A. He turned into Lafayette Street and stopped and asked us was that some of the boys. We said, 'Yes, we think that's

"to see about" the damage that had been done to his car (R. 760, 873). None of petitioners Cage, Chevalier or Davis had ever known Ward to carry or own a gun (R. 808, 746). None of petitioners knew what Ward intended to do on encountering the young men who had damaged his car;[16] on approaching the scene of the earlier incident, they observed a group of white men standing in the street (R. 808, 877-78); Ward asked petitioners Cage, Chevalier and Davis whether these were some of the men who had damaged his car and some or all of petitioners replied that they thought

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some of them.' And one of the boys started towards the car and said something to Mr. Ward. And I heard Mr. Ward say, 'I'll fight you all,' and I saw a gun in Ward's hand.

Q. Where did this gun come from? A. I don't know, because I didn't know he had it until it was in the window and fired.

Q. You hadn't seen that gun earlier in the evening? A. No, Sir.

Q. What did this boy say? A. I didn't understand what he said, because the back window was wound up in the car. I was sitting on the right-hand side. But I did hear him saying something."

On direct examination petitioner Davis testified (R. 746):

"Q. And you had no gun? A. No, Sir.

Q. And you didn't see any gun? A. I didn't see any gun.

Q. During the time you had worked for Ward at his store, which you said was September until through November 10th, had you ever seen him with a gun? A. No, Sir.

Q. Had you ever seen either of the other boys, either Cage or Chevalier with a gun? A. No, Sir.

Q. Had you ever packed a gun? A. No, Sir."

[16] On cross-examination, petitioner Davis testified (R. 829):

"Q. Now, what did you all talk about—what did you all talk about out front then besides the breaking of the windshield and Ward's asking Chevalier how his head was, what else did you talk about when Ward was there? A. That's all.

Q. You didn't talk about anything else? A. No, Sir.

* * * * *

"Q. Now, when he got in—since you didn't talk about anything else, then, when you got in the stationwagon, did Ward

it was (*Ibid.*). On stopping in front of the group, one of the men in the group ran toward the car stating to Ward, "You black bastard, do you want to fight?" (R. 878). Ward then pulled the gun from its place of concealment and

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tell you where you were going? A. No, Sir, he didn't. I didn't have any. . . .

Q. Did you have any idea where you were going? A. Well, I figured we was probably going to the police station or maybe to the hospital.

* * * * *

"Q. Was there any conversation as you went out Dixie Street to Texas Street?

* * * * *

"A. If there was any conversation, it was about the place up on Bill's head—Chevalier's head" (R. 831).

* * * * *

"A. I remember a conversation about Chevalier's head.

Q. Chevalier's head? A. And a conversation him asking where it had happened.

Q. Will you repeat that? A. And then he asked us where did this incident happen.

Q. And where were you at that point? A. We was on Church Street if I remember right—Church Street or the corner that comes in Church Street or somewhere in the middle of the block" (R. 832).

Petitioner Earl Davis testified on direct examination (R. 746):

"Q. Now, from the time you left the inn and while you were driving towards downtown Natchitoches, where did you think you were going? A. I figured we was going to the police station or somewhere or the hospital because Chevalier was still bleeding, and Mr. Ward had seen that his head was still bleeding, so he thought it was pretty bad, so he asked Chevalier about his head, was his head doing all right."

Petitioner Davis further testified on direct examination:

"A. Well, I'm not familiar with the streets. All I know is that we came back out on Texas Street—we made a left-hand turn on Texas Street, until we got to Fifth Street, and then a right-hand turn and went straight up until we got to some street—Church Street.

Q. All right. A. And made a left-hand turn on Church Street. Then Bill's [William Chevalier's] head was still bleeding a little then and my uncle, Edward Ward, asked him how was his head, and he told him that his head was doing a little

replying, "Yes, I'll fight, goddammit," fired at the man who approached his car (R. 449-50, 808, 879). John Fisher standing on the street at the scene was killed (R. 330). Petitioners Cage, Chevalier and Davis had no opportunity to prevent Ward from firing as he did (R. 748-51, 807-09).

Thus none of the essential elements of aiding and abetting under Louisiana law were established. There was no evidence to establish their guilt of any crime in connection with Fisher's death, and no evidence inconsistent with their innocence.

The trial judge never defined aiding and abetting for the jury in his charge. He merely read LSA-R.S. 14:24 to the jury (R. 956), without explaining any of the terms used.[17] The trial judge's *per curiam* overruling the no evidence objection did not discuss the evidence as to these three petitioners in even a general or conclusory manner. And despite a host of decisions declaring that a no evidence claim is one which the Louisiana Supreme Court "must decide" (*State* v. *Nomey*, 204 La. 667, 16 So.2d 226, 227 (1943), and cases collected; *State* v. *Wooderson*, 213 La. 40, 34 So.2d 360 (1948); *State* v. *Sbisa*, 233 La. 961, 95 So.2d 619, 62[illegible] (1957)), that court affirmed without com-

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better. I mean, that it was doing all right. And so then he asked him, say, 'Where was the place that this happened at?'

Q. Now, just a moment. Where were you when your uncle asked you that? A. We were on—we were either making the turn on Church Street or in the middle of the block. I'm not sure where it was, but. . . .

Q. Had your uncle asked you that at any time previously? A. No, Sir.

Q. Was that the first time he asked that? A. Yes, Sir" (R. 806-07).

[17] The potential confusion of a layman hearing a reading of LSA-R.S. 14:24 is enormous. One might even be misled to believe that merely being "concerned in the commission of a crime" without more is enough to convict.

ment upon petitioners' arguments that there was no evidence to support the conviction.

This is a plain case for application of the rule of *Thompson* v. *Louisville*, 362 U. S. 199, that a conviction without evidence denies due process as protected by the Fourteenth Amendment.[18]

Following *Thompson*, this Court has applied the same rule in *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 376 U. S. 154; and *Barr* v. *Columbia*, 378 U. S. 146, all cases involving misdemeanor convictions.[19] This rare and unusual case presents the no evidence issue in the context of a capital felony and three sentences of life imprisonment. It is submitted that the severity of the punishments involved and the unusual clarity of petitioners' innocence in the record militates in favor of this Court's exercising its certiorari jurisdiction in this case.

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[18] In *Thompson* there was no provision for an appeal of the conviction in the state courts. Here the state trial and appellate courts simply never discussed the issue in their opinions.

[19] These "no evidence" decisions are somewhat akin to several decisions based on the "due process vagueness" ground such as *Wright* v. *Georgia*, 373 U. S. 284, and *Bouie* v. *Columbia*, 378 U. S. 347. The *Bouie* decision might have been directly applicable to the instant case if the Louisiana Supreme Court had discussed the merits of the no evidence argument and attempted to expansively construe its law on aiding and abetting felonies to cover the facts of this case.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion Below

Wednesday Jul 1 1964

SUPREME COURT OF LOUISIANA

No. 47122

State of Louisiana,

Versus

Edward Ward, Charles Cage, William Chevalier, and Earl Davis.

Appeal from the Tenth Judicial District Court, Parish of Natchitoches; the Honorable Julian E. Bailes, Judge.

Hawthorne, J.

Edward Ward, Charles Cage, William Chevalier, and Earl Davis, charged with the crime of murder, were jointly tried. Ward was found guilty as charged and sentenced to death, and the others were found guilty as charged without capital punishment and sentenced to imprisonment in the state penitentiary at hard labor for life. The errors complained of on this appeal are presented to us by means of bills of exception which were timely reserved and perfected.

The indictment charging these defendants with the murder of John Fisher was returned by the grand jury on March 5, 1963. On March 14 they were arraigned in open court. Each, represented by qualified and competent counsel of his choice, pleaded not guilty, and the case was fixed for trial for April 1. On the day the case was fixed for

trial, and when the petit jury venire was present, counsel for the accused filed a motion to withdraw the pleas of not guilty in order to file certain motions. One of these was a motion to quash the indictment on the alleged ground that the district attorney and other unauthorized persons were present during the deliberations of the grand jury which returned the indictment against these defendants. The trial judge denied the motion to withdraw the pleas of not guilty as having been filed too late. In overruling the motion the judge stated:

> "On the morning of the trial and before the trial started, defendants filed a motio to quash the bill of indictment. This motion was based on the ground that the District Attorney and other unauthorized persons were present in the Grand Jury room during its deliberations.
>
> "To have heard this motion it would have required the taking of testimony, preceded by the summoning of witnesses, preparation on the part of both defendants and the State. Obviously, it could not have been disposed of prior to commencement of the trial on April 1, 1963.
>
> "The court ruled that the defendants were dilatory in the filing of the motion; that the court would have permitted the defendant to have withdrawn their plea to the indictment and have heard the motion had the motion been filed timely; that the court was available to the defendants for an earlier filing and hearing at any time during the previous two weeks."

Article 284 of the Code of Criminal Procedure provides that every objection to an indictment shall be taken by demurrer or motion to quash before arraignment, and hence counsel in the instant case in order to file his motion to quash sought first to withdraw the pleas of not guilty

previously entered. Article 265 of the Code of Criminal Procedure provides that a defendant may at any time with the consent of the court withdraw his plea of not guilty and then move to quash the indictment. To permit the withdrawal of the plea of not guilty in order to file such a motion, however, is discretionary with the trial judge, and his ruling will not be disturbed unless an abuse of discretion is shown. State v. Dawson, 186 La. 900, 173 So. 524; State v. Verdin, 192 La. 275, 187 So. 666. The motion to withdraw the pleas in the instant case does not give any explanation of why the motion to quash was not timely filed, and under these circumstances we cannot say that the trial judge abused his discretion.

Even if he did abuse his discretion, however, it was not reversible error because defendants were later given an opportunity to prove the allegation forming the basis of their motion to quash. In their motion for a new trial they reiterated the allegation that the district attorney and other unauthorized persons were present in the grand jury room during the jury's deliberations. This motion was fixed for hearing, and the judge heard evidence on this allegation before overruling the motion.

Article 215 of the Code of Criminal Procedure provides that the district attorney as the legal adviser of the grand jury shall have free access to sessions of that body. This right of access, however, is limited by the provision of Article 19 of that Code that "* * * no district attorney or other person shall be present during the deliberations of the grand jury on their findings". Article 507 of the Code states that every motion for a new trial must specify the ground upon which relief is sought, and that the proof must correspond with the allegations of the motion. In State v. Slack, 227 La. 598, 80 So.2d 89, this court after quoting that article said:

> "* * * Conformably with this provision, it was held in State v. Wash[illegible]ton, 169 La. 595, 125 So. 629, that if the allegations of a motion for a new trial are not supported by proof, it is properly overruled. See also State v. Martin, 151 La. 780, 92 So. 334."

The question presented, therefore, is whether defendants have proved these allegations found in the motion. If so, the motion would have merit.

At the hearing nine members of the grand jury which returned the indictment testified, and it was stipulated that the testimony of the other three would be substantially the same as that given by one of the grand jurors who did testify. The district attorney also testified. The trial judge denied the motion, stating:

> "After hearing the testimony, the court concluded there was no merit whatever to this ground urged for a new trial by defendants. The court found there were no unauthorized persons in the Grand Jury room during deliberations, and that the District Attorney was called for by the Grand Jury and admitted to the room for the purpose of further instructing the Grand Jury on the law, but that no deliberations by the Grand Jury were conducted during his presence."

After reading the testimony taken on the hearing of the motion we conclude that defendants have utterly failed to prove the allegations of their motion, and that the trial judge was therefore correct. Counsel for the accused relies solely on the testimony of one of the grand jurors, but his testimony clearly shows that he was confused about the meaning of the term "deliberations" as used in the statute.

During the trial of the case the State offered in evidence both oral and written statements or confessions made by

all defendants. Counsel for defendants objected to the offering of these statements in evidence on two grounds: (1) That the proper foundation had not been laid for their admission, and (2) that the statements of each defendant were not made in the presence of the remaining defendants and for that reason were hearsay and inadmissible. In brief filed in this court counsel cites no law in support of his contentions, but merely states that in admitting the confessions the court was in error.

As to the first ground, in laying the foundation for the admission of these statements or confessions the State established that they were given freely and voluntarily by each defendant and were not made under the influence of fear, duress, intimidation, menaces, inducement, or promises; and under these circumstances they were properly admitted by the trial judge. In fact, counsel did not contend in argument before this court that they were not freely and voluntarily made.

As to the second ground, upon the admission in evidence of each statement or confession the trial judge properly instructed the jury that it must not consider the confession as evidence against any defendant except the defendant who made the confession; and the presumption is that the jury followed the judge's instructions. State v. Johnson, 47 La. Ann. 1225, 17 So. 789; State v. Sims and Mays, 106 La. 453, 31 So. 71; State v. Harris and Nellum, 27 La. Ann. 572. Moreover, the instructions to the jury were properly given in view of the fact that these defendants were jointly tried, counsel not having requested a severance for any one of them.

The confessions were therefore properly admitted into evidence.

Defendants seek a new trial "On the further ground that your defendants are members of the colored race, and that even though members of their race were on the regular

venire, on the venire of tales jurors and among the bystanders summoned by the Sheriff as prospective jurors after both the general venire and the venire of tales jurors had been depleted, all of those members of your defendants' race who were interrogated as prospective jurors, who did not disqualify themselves, were peremptorily challenged by the District Attorney and consequently no member of their race was on the jury that convicted them".

The defendants contend that the district attorney's peremptorily challenging of members of the Negro race denied to them their constitutional rights because it constituted a systematic exclusion of Negroes from the petit jury which tried them. Defendants offered no proof whatever of these allegations, and for all intents and purposes this should end the matter. But their allegations, even if accepted as true, would not show a violation of their constitutional rights so as to entitle them to a new trial.

The right of peremptory challenge is guaranteed to an accused by the Constitution of this state, Art. 1, Sec. 10, and the number of peremptory challenges to the State and to the defendant is fixed by statute, La. Code Crim. Proc. Art. 354. The right of peremptory challenge is a right not to select, but to reject, and this right of rejection may be exercised without assignment of any cause or reason or inquiry into the motive. It was said many years ago by this court that neither the State nor the defendant has any right to complain of peremptory challenges tendered by the other. See State v. Durr, 39 La. Ann. 751, 2 So. 546.

Counsel for the accused cites and relies on Eubanks v. Louisiana, 356 U. S. 584, 78 S. Ct. 970, 2 L. ed. 2d 991, and Hernandez v. Texas, 347 U. S. 475, 74 S. Ct. 667, 98 L. ed. 866, which are authority for the proposition that defendant is denied the equal protection of the laws guaranteed by

the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race. Counsel for the State calls to our attention that the United States Court of Appeals for the Seventh Circuit specifically rejected the contention that those cases were authority for the argument that the use of the right of peremptory challenge given by a state statute to challenge members of a defendant's race could be a deprivation of a defendant's constitutional rights. The court recognized the traditional concept of the nature of the peremptory challenge as absolute and as precluding inquiry into the motives or mental attitudes of the one to whom the right is given. Writs were refused by the United States Supreme Court. United States ex rel. Dukes v. Sain, 297 F. 2d 799 (1962), writs denied 369 U. S. 868, 82 S. Ct. 1035, rehearing denied 370 U. S. 920, 82 S. Ct. 1558.

The defendant in that case, like the defendant Ward in the instant case, was a Negro sentenced to death for murder. After his conviction and sentence had been upheld by the Illinois Supreme Court, he applied for relief by writ of habeas corpus in the federal courts. He complained there, as do the defendants in this case, that the state's attorney had used his peremptory challenges to exclude all Negroes from the jury which tried him, thereby denying him due process and equal protection of the laws.

For the reasons assigned the convictions and sentences are affirmed.

Rehearing Refused Oct 7 1964.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 5 1965
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No. 801

In the Supreme Court of the United States

OCTOBER TERM, 1964

EDWARD WARD, CHARLES CAGE, WILLIAM CHEVALIER, AND EARL DAVIS,
Petitioners,

v.

STATE OF LOUISIANA,
Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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v.

STATE OF LOUISIANA,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Louisiana Constitution of 1921, Article 7, § 10

> § 10. The Supreme Court has control of, and general supervisory jurisdiction over all inferior courts.
>
> . . .
>
> . . . In criminal prosecutions, its appellate jurisdiction extends to question of law alone.

2. Louisiana Revised Statutes Annotated, R. S. 14:-23 (Volume 9, page 84)

> § 24. Parties to Crimes

The parties to crime are classified as:

(1) Principals; and

(2) Accessories after the fact

3. Louisiana Revised Statutes Annotated, R. S. 14:24 (Volume 9, page 86):

§ 24. Principals

All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, said and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

4. Louisiana Revised Statutes Annotated, R. S. 14:30 (Volume 9, page 352):

§ 30. Murder

Murder is the killing of a human being.

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of murder shall be punished by death.

5. Louisiana Revised Statutes Annotated, R. S. 15:-445 (Volume 11, page 453):

§ 445. Inference of intent; evidence of acts similar to that charged

In order to show, intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction.

6. Louisiana Revised Statutes Annotated, R. S. 15:-446 (Volume 11, page 459):

§ 446. Evidence where knowledge or intent is material and where offense is one of a system

When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged.

7. Louisiana Revised Statutes Annotated, R. S. 15:-507 (Volume 12, page 80):

§ 507. Specification of grounds for relief: trial; proof

Every motion for a new trial must specify the grounds upon which relief is sought, must be tried contradictorily with the district attorney. and the proof must correspond with the allegations of the motion.

one of these boys and hurriedly drove away to a club east of Natchitoches where he separated from Cage, Chevalier and Davis, advising them, if asked, to deny any knowledge of the shooting—(R. 847, 849)

ARGUMENT

I.

As a reason for granting the writ, the petitioners cite the then pending case of *Robert Swain v. Alabama* which was decided March 8, 1965 after the petitioners' brief was filed.

The issues in the Swain case relative to the State's peremptory challenges were not similar to the issue of the instant case. In that case there was some evidence that negroes had been peremptorily challenged or struck by the prosecution from the petit jury. In the present case, there is no evidence at all that any negroes were peremptorily challenged by the prosecution. In fact, there is no proof at all on this point in the record, and this will be discussed under the heading of the next point.

II.

The petitioners contend that the public prosecutor's racial use of peremptory challenges to exclude negroes from jury service violated their right to due process and equal protection under the laws.

On April the 18th, 1963, the petitioners in this case filed a motion for a new trial (R. 963) alleging,

> "on the further ground that your defendants are members of the colored race, and that even though

> members of their race were on the regular venire, on the venire of tales jurors and among the bystanders summonsed by the sheriff as prospective jurors after both the general venire and the venire of tales jurors had been depleted, all of those members of your defendants' race who were interrogated as prospective jurors, *who did not disqualify themselves*, (Emphasis supplied) were peremptorily challenged by the district attorney and consequently no member of their race was on the jury that convicted them."

A hearing was had on the petitioners' motion for a new trial on April 24, 1963 at which time evidence was taken in support of the motion on other grounds, but the petitioners did not attempt to offer any evidence at all to show any discretion on the part of the prosecution in the use of its peremptory challenges. In fact, it is the distinct recollection of the district attorney that the majority of the negroes all excused themselves principally, because they did not believe in capital punishment, and to a lesser extent, because of a close relationship or acquaintanceship with one or more of defendants which would tend to prejudice them. Additionally, while it is not asserted as a fact, it is the impression of the district attorney that the petitioners' counsel exercised peremptory challenges himself in excusing several members of the colored race.

Petitioners assert that because the district attorney apparently did not contest the factual assertion by them, the trial judge assumed the truth of the allegation in ruling that the state is excusing

negroes from service on the jury was exercising and utilizing peremptory challenges which it had a right to do.[4] Let it be noticed that the district attorney had no opportunity to make any kind of denial except by brief to the Supreme Court of Louisiana, and then deemed it unnecessary in view of the fact that there was no evidence to support the allegation.

Petitioners say on page 16 of their application,

> "that although the Supreme Court of Louisiana found that petitioners had not offered proof that negroes were systematically excluded by use of the state's peremptory challenges, the Court chose to disregard this conclusion, exercised its discretion and decided petitioners constitutional claim as if the allegations with respect to use of peremptory challenges were true."

Petitioners admit that the Supreme Court of Louisiana found that they had offered no proof of this use of peremptory challenges. The law of Louisiana requires that the allegations offered in support of a new trial be proved.[5] Defendants must make some showing to support a motion for a new trial.[6] If allegations of a motion for a new trial are not supported by proof, the motion is properly overruled.[7] The decision of the Court was based upon the jurisprudence of the State of Louisiana, however, the Court did go on to discuss the right of peremptory challenges by

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[4] Petition for Certiorari, page 9.

[5] LSA-R. S. 15:507, supra

[6] *State v. West*, 1931, 172 La. 344, 134 So2d 243, *State v. . hworth*, 1906, 117 La. 212, 41 So. 550

[7] *State v. Slack*, 1955, 227 La. 598, 80 So2d 89.

both the state and the defendant[9], *State v. Durr*[8], and *Dukes v. Sain*[10].

It might be said in passing that it would be an unskillful prosecutor indeed who would waste peremptory challenges on the color of a man's skin while knowing at the same time that after their exhaustion, he might be forced to accept a juror of the most prejudiced sort.

It is submitted that by authority of the Swain and Dukes decisions, and cases cited therein, the contention of the petitioners in this respect is without merit.

III.

THERE WAS EVIDENCE FROM WHICH THE JURY COULD FAIRLY INFER THAT CAGE, CHEVALIER AND DAVIS KNEW THAT EDWARD WARD INTENDED TO KILL OR INFLICT GREAT BODILY HARM UPON THE BOY RESPONSIBLE FOR BREAKING WARD'S WINDSHIELD AT THE TIME THEY LEFT THE CASA GRANDE WITH WARD AND THAT THEY ENTERTAINED THE SAME INTENT AND ACTIVELY ASSISTED WARD IN THE COMMISSION OF THE CRIME OF WHICH THEY WERE CONVICTED.

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[9]167 So2d at page 362.

[8]*State v. Durr*, 39 La. Ann. 751, 2 So. 546

[10]*U. S. ex rel. Dukes v. Sain*, 297 F.2d 799 (1962) Writs denied 369 US 868, 82 S. Ct. 1035, 8 L. Ed. 2d 86. Rehearing denied 370 U S. 920, 82 S. Ct. 1558, 8 L Ed 2d 500.

In criminal matters, the appellate jurisdiction of the Louisiana Supreme Court extends to questions of law alone."

While the Louisiana Jurisprudence recognizes that the absence of any evidence at all to support a conviction becomes a matter of law," it is only in cases where there is no evidence at all tending to prove that particular fact which is essential to a valid conviction, that the Court may set aside the conviction for want of proof of the guilt of the defendant."

Louisiana has abolished the common law distinction between principals and accessories before the facts, and parties to crimes are classified as principals and accessories after the fact."

LSA R. S. 14:24 provides:

> "all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

The Louisiana statute defining murder requires the presence of a specific intent to kill or to inflict great bodily harm."

"Section 10, Article 7, Louisiana Constitution of 1921 as amended, supra

"*State v. Ware*, 1891, 43 La. Ann. 400

"*State v. Rogers*, 1961, 132 So2d 819, 214 La. 841, Cert. denied 82 S. Ct 1589, 370 U. S. 963, 8 L. Ed. 2d 830, and cases cited in the original opinion.

"LSA-R. S. 14:23

"LSA-R. S. 14:30

As to what constitutes one a principal, American Jurisprudence states the general rule to be that he must be present, aiding by acts, words or gestures and consenting to the commission of the crime, either before or at the time of the commission of offense, with full knowledge of the intent of the persons who commit the offense.[16] Therefore, one who inflames the mind of others and induced them by violent means to do an illegal act is guilty of such act, although he takes no other part therein. If he contemplates the result, he is answerable, although it is produced in a manner different from that contemplated by him. If he gives directions vaguely and incautiously and the person receiving them acts according to what he might foresee would be the understanding, he is responsible.[17]

> Mere knowledge that a crime is going to be committed, in the absence of a duty to prevent it, does not make one guilty of participation in it, but where one takes another to the scene of the crime with knowledge that it is going to be committed or assist the active culprit to get away can not claim innocence.[18]

> The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is criminal and in what degree it may be so. When, in a prosecution for homicide, it is shown that the accused used a deadly weapon in the commission of a homicide which is the subject of the

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[16]Am. Jur. Criminal Law, Volume 14, Sec. 87, page 826

[17]Am. Jur. Criminal Law, Volume 14, Sec. 90, page 829

[18]Corpus Juris Secondum, Sec. 88(2), page 263.

prosecution, the law infers or presumes from the use of such weapon, in the absence of circumstances of explanation or mitigation, the existence of the mineral element—intent, malice, design, premediation, or whatever term may be used to express it—which is essential to culpable homicide."[19]

"Evidence which shows or tends to show preparations, on the part of the defendant in a prosecution for homicide, for the killing is relevant, material, and admissible, whether the fact of killing is denied or the accused relies on self-defense. Proof may be given that shortly before the commission of the homicidal act, the defendant procured a weapon such as caused the mortal wound."[20]

"All minor or evidentiary circumstances which tend to shed light on the intent of the alleged slayer are admissible in evidence in a prosecution for homicide, although they may have happened previous to the commission of the offense charged."[21]

We must look to the record then to see whether or not there was intent, knowledge, and aid or assistance rendered to the petitioner Ward by the petitioners, Chevalier, Cage and Davis (hereinafter referred to as defendants), in order to determine whether there was some evidence of these essential elements to support their convictions.

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[19] Am. Jur. Homicide, Volume 26, Sec. 305, page 360

[20] Am. Jurisprudence Homicide, Volume 26, Sec. 322, page 372

[21] Am. Jur. Homicide, Volume 26, Sec. 324, page 376

CAGE, CHEVALIER AND DAVIS HAD A MOTIVE FOR THE MURDER.

While Louisiana law does not require the proof of motive as an element of the crime, its existence shows a previous relationship between the parties and has an evidentiary bearing upon the actor's intent.[22]

There had been an argument between the three defendants and Weeks and Brupbacker of such intensity as to motivate W. C. Courtney to throw a brick or large rock at them with such great force as to smash the door to the Circle Cafe. Weeks had thrown the stone back at them with such force as to break the windshield of Ward's Buick they were driving, and causing glass to cut Chevalier's head.

After leaving the Circle Cafe, making the block and driving past it again in search of Courtney, a group of boys who had gathered in front of the cafe hollered at them, telling them to stop and cursing. (R. 742, 743)[1] (R. 817)[2]

Here was evidence of a motive of revenge.

EVIDENCE THAT CAGE, CHEVALIER AND DAVIS DELIBERATELY INCITED WARD TO VENGEFUL WRATH—EVIDENCE OF THEIR INTENT

The story related to Ward by these three defendants was that they were standing on the sidewalk and some white boys came along and bumped into

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[22]Am. Jur. Homicide, Volume 26, Sec. 321, page 371

[1]Footnote 1 supra

[2]Footnote 2 supra

them and deliberately pushed them off the sidewalk. (R. 872) When Ward asked them, what they the defendants did, they, through Chevalier their spokesman, replied that "they didn't do anything. That they didn't want to get in trouble and that a fellow picked up a brick and threw it through the windshield, breaking it." (R. 872) No one told Ward that W. C. Courtney had thrown the rock at the white boys first. (R. 759 Davis) (R. 573 Cage) All three defendants participated in this lie. (R. 574-805 Cage) (R. 555 Chevalier) (R. 566 Davis)

EVIDENCE OF WARD'S FRAME OF MIND AS IT BEARS ON INTENT

The above version of the rock throwing incident was highly inflamatory and of such a nature as to provoke anyone to anger. Ward's car windshield was smashed by the boys at the Circle Cafe. His nephew who lived with him and his friends who worked for him had been badly handled and pushed around. They had been "ganged", cursed, (perhaps invited to come back and fight?) at the Circle Cafe—Chevalier was bleeding from a cut on his head—W. C. Courtney was missing. Ward got mad. "I'm mad from the word go", he said. (R. 880) He also gave this as a reason for his not thinking when he got a gun before leaving the Casa Grande Club to go downtown. Cage says "he (Ward) got mad". (R. 574)

ADDITIONAL EVIDENCE OF WARD'S INTENT TO KILL OR INFLICT GREAT BODILY HARM

After listening to the rock throwing version in front of the Casa Grande Club, Ward went back in and returned with George Wright where Wright gave him the murder weapon from his Volkswagon parked in front of the club. (R. 873, 874 Ward). Ward did not eve. look at the damage to his Buick until he passed by it in the process of getting to his station wagon to go downtown. (R. 874)

Ward told the other three defendants to come go show him downtown and show him the boys and where it happened and we would see about this. (Cage R. 574)

Davis said Ward said, "let's go downtown to the place where the windshield got broken." (R. 796, 797, 563)

EVIDENCE THAT CAGE, CHEVALIER AND DAVIS KNEW OF WARD'S INTENT TO COMMIT MURDER OR GREAT BODILY HARM UPON THEIR ANTAGOMISTS AT THE CIRCLE CAFE.

That Chevalier, Cage and Davis knew of Ward's anger has already been shown. They also knew that Ward was armed.

Ward did not pretend that he made any effort to hide the gun as he walked across the street from Wright's Volkswagon to his Buick, where the others were standing but he tried to make it appear that the others were already in his station wagon when he came across the street and got in it, hugging the gun close to him and slipping it under the seat to his right.

However, Cage said, "we stood out by the car

until he (Ward) came back, and he told us to get in the car." (R. 806)

Davis said they were "all standing up in front of the Buick right behind the station wagon." (R. 767). Davis saw Ward at the Volkswagon and when he came over from the Volkswagon he told them to get in the car and go with him. (R. 769, 770)

Cage, Chevalier and Davis were not separated from the time they arrived at the Casa Grande until after the shooting with the exception of the time Chevalier spent inside the club getting Ward, which was just long enough to go inside and come right back out. (R. 772 Davis)

Chevalier said in his statement, "I think George gave him a pistol." (R. 555)

There was nothing to prevent the others from seeing Ward's gun as he walked across the street, and they all got in his car. What was there to be seen could reasonably be inferred by the jury to have been seen.

An armed and angry man asked Cage, Chevalier and Davis to take him downtown where the rock throwing incident occurred and to show him the boys that did it. *Ward's intentions were unmistakeable.*

EVIDENCE THAT CAGE, CHEVALIER AND DAVIS AIDED WARD IN CARRYING OUT HIS INTENTION.

Both Davis and Cage say that Ward told them to take him back downtown where the incident happened. (R. 574, 796, 797) The undisputed fact that

they did is evidence of their aid and assistance.

On the way downtown, the defendants passed the Sheriff's office, State Police Substation, and came within one-half a block of the City Police Station but made no effort to seek official assistance. All of this rebuts Ward's statement that he only wanted to see about getting his windshield paid for.

The circumstances surround the shooting itself goes far to reveal the intent and design of the defendants.

In their testimony, the defendants seek to make it appear that they rolled up to the corner of Second and Lafayette Streets without hesitation and stopped. The purpose of this is to maintain the consistency of Ward's defense that he was inflamed by someone's invitation, "you black bastard! Do you want to fight?". However none of this is consistent with the facts.

Earl Davis says in his statement and in his testimony that "Ward asked us if that was some of the boys and we said yes, we think that is some of them". (R. 749) In Cage's testimony with reference to Ward asking if those were the boys (involved in the rock throwing incident), he said "and we said we believe it was". (R. 808) Davis admitted on cross examination that he got a good look at the boy who threw the rock through the windshield—that he was dressed in a white shirt, black trousers, coatless and hatless. (R. 748)

Weeks described the murdered John Fisher's dress and build

A. John had on a white dress shirt, dark tie and dark trousers similar to myself.

Q. Did he have on a coat?

A. No sir.

Q. Did he have on a hat?

A. No sir.

Q. Can you describe his general build?

A. Yes sir. He was—I guess he was, maybe, two or three inches shorter than I am—but maybe a little bit broader, but similar build. (R. 144)

It was the state's theory that when the defendants first sighted the group of boys standing in front of the premises at 801 Second Street, Ward slowed the car down in order that his passengers might study them to see if any of these boys were those involved in the rock throwing incident and that they mistakenly identified John Fisher as the boy who threw the rock through Ward's windshield, or Larry Weeks. This is borne out by the testimony.

Larry Weeks was sitting next to a window overlooking the intersection of Lafayette and Second Streets when the lights from Ward's car swept into the window and caused him to turn and look down, and as he did, he saw two flashes from the driver's side of the vehicle. (R. 141) The vehicle appeared to be stopped partially onto Lafayette Street going toward Washington Street with the back part on Second Street. (R. 142) He ducked when the shots were fired and heard the car tires screech around the corner

going off fast down the hill toward Washington Street. (R. 143)

Daniel Brupbacker states that Donald Bates and Sidney O'Brien, who was escorting the former away from the house, were walking toward Texas Street, away from Lafayette and Second Streets, and that the witness walked up and said something to John Fisher and walked back to the steps of the apartment, and as he approached the steps he heard two shots. (R. 267) He states that Fisher was standing right in front of the steps on the sidewalk facing away from the corner of Lafayette and Second Streets when the witness turned and walked back toward the steps. (R. 268) When the shots were fired, he turned around and saw John Fisher fall on the ground and blood run out of his mouth. (R. 268) He says that as he turned and took a couple of steps back toward the house John Fisher was talking to O'Brien who was walking away from the front of the house in the opposite direction from the intersection from which the shots came. On cross examination, Brupbacker was asked,

"Q. Did you hear Mr. Fisher say anything to anyone other than some of the boys who were out there?

A. No sir.

Q. Did you hear Mr. Gowland say anything to anybody?

A. No sir." (R. 291)

At the time of the shooting Gary Harkins was standing on the bottom steps of the apartment or on

the sidewalk right in front of the steps facing John Fisher and the street, Second Street in front of the apartment. (R. 300) Ward's car was coming up Second Street at this time. (R. 300)

Summarizing this witness's testimony, he stated that he noticed the station wagon coming up the street and that its occupants put their lights on them. The witness thought it was someone who was about to park and come over to the house. He says that after looking back at John, the car started coming back up the street again and that it then pulled in Lafayette Street at an angle, two shots were fired, the vehicle drove off and John Fisher was on the sidewalk. (R. 301). The witness says that at the moment the shots were fired John Fisher was talking to him, Danny Brupbacker and Charles Gowland with his back toward Lafayette and looking toward the witness to his right a little. (R. 302). His description of the approach of the automobile was that it slowed down almost stopping to about two or three miles an hour, just barely creeping along, that two shots were fired and they were gone (R. 306). He says that it was stopped for only a couple of seconds (R. 317).

Summarizing Charles Gowland's testimony, the witness stated that they were all standing outside the apartment and that there was no loud talk or disturbance outside, just general conversation (R. 327). In a matter of minutes, he observed the white station wagon approach from the south on Second Street. He began to pay particular attention to it because the uncle and aunt of his girl friend whom he dated that

night had an identical station wagon, and he thought that perhaps it was she coming back to the apartment for some reason (R. 328). He went on to say that the car made a slow approach up Second Street, turned into Lafayette and stopped although he could not tell who was in the car, whether they were black or white. (R. 328). He stated that he heard something shouted from the car, although he was unable to understand what was said (R. 335), and then saw two flashes and the sound of a gun (R. 330) and John Fisher said, "I'm hit." (R. 329). The witness stated that at first he thought it was a prank or firecrackers (R. 330).

This witness stated that he did not hear any one standing outside or any of his party at the premises say anything to the occupants of the station wagon. (R. 380)

With respect to the manner in which the car left the scene, Gary Harkins said it left as fast as it could. (R. 303)

The witness, Sidney O'Brien testified,

> "Well for a moment we stood out in front of the steps, well actually it was just a moment and Fisher wanted to know if I could handle Donald Wayne, and then, I said yes go on, go ahead and I would take him on to the dorm, so Donald Wayne and I had turned and were actually going north on Second Street, walking down the sidewalk to the car, and we had gotten along approximately to the end of the porch, and Donald Wayne decided he wanted to go back in, so I stopped him and was stand-

ing in front of him. And along about that time, well this—were these lights—car lights."

Q. "Were you looking in the direction of these lights?"

A. "No sir. I was looking north on Second Street."

Q. "All right."

A. "And as I noticed the glare of the lights down the street, I glanced around to my left and I saw this—well it was new—it was a Ford station wagon. And—it was the rear end of it I saw, maybe four to six feet the rear end of it, turn to go on Lafayette Street. And I just glanced by back around and about that time well, Donald Wayne—well I heard these two shots, just bang, bang. Actually at the moment I thought it was a car load of high school kids and saw a bunch of us out there and threw a couple of firecrackers out to scare us, and well about that time Donald Wayne says 'My God, he's shot', and both of us turned around about that time and Fisher was laying on the sidewalk with blood all over his face." (R. 344)

These were the only witnesses outside of the apartment who knew anything about the shooting with the exception of Donald Wayne Bates, who died prior to the trial as was stipulated in the record.

Photographs introduced into evidence show the body of John Fisher lying on the sidewalk in front of the steps of the apartment where the witnesses testified that it fell.

Dr. Charles Cook, the parish coroner, went to

the scene of the shooting and later performed an autopsy on the body of the victim. His testimony established that a bullet had entered John Fisher's body from the back near the shoulder blade on the right, traveling up and slightly to the left, severing the large aorta of the heart and stopping just under the skin near the left nipple. (R. 205, et seq.)

The testimony of Dr. Cook relative to the path of the bullet through the victim's body corroborates the testimony of the witnesses as to which way the victim was facing at the moment he was shot. Gary Harkins was standing on the steps facing John Fisher and Second Street at the moment of the shooting and he says that when Fisher was shot, he was facing toward us, he was to our left and was facing back toward us. (R. 302)

The location of these witnesses was also indicated by them on a large plat of the area marked Exhibit "G" which was displayed to the jury.

This testimony is diametrically opposed to the defendant's contention that John Fisher walked up to the station wagon and uttered a vile challenge. Ward said he stopped on the corner with the intention of questioning the fellows on the corner but that before he had an opportunity to open his mouth and say anything, someone *rushed up to him* and said,

> "you black son of a bitch, do you want to fight.", to which he replied, "yes, I'll fight, god damm it or words to that effect". (R. 878), and that he reached down and got the gun and fired twice out of the window." (R. 878-879)

Unquestionably Ward fired at the person whom he said rushed up to the car and uttered the challenge.

> "I fired at someone who approached the car, I'm trying to clarify this, I don't know which one of the guys from the other one, that who ever made the remark to me and attempted to approach the car, that is the individual I fired at." (R. 893)

The evidence leaves no room for doubt that Edward Ward shot and killed a boy who appeared very much like the boy who had thrown a brick through the windshield of his car, and he could have known who that boy looked like *only by having him pointed out by his co-defendants* as he approached the premises at 801 Second Street and studied the group of boys out front.

This evidence supports the state's theory that Ward's statement to the effect that "I'll fight you all right", was not made in response to anything that was said by any of the boys standing out in front of the apartment but simply that Ward was finishing up something that he thought they had started.

The record abounds with evidence of aid Cage, Chevalier and Davis rendered to Ward in perpetrating this crime. There is evidence that they aided him with knowledge of what he intended to do—kill or inflict great bodily harm, and there is evidence that they actively entertained a similar intent and desired the resulting consequences.

The petitioners complain that the trial court did not sufficiently instruct the jury of the LSA R. S.

14:24, relating to principals. This point is raised a bit late. No objection was made to the charge nor was any special instruction requested. However, it is submitted that the language of this article should not be so difficult to comprehend to the average man, and there was evidence offered to prove the principal relationship.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, Jack P. F. Gremillion, a member of the bar of the Supreme Court of the United States and Louisiana Attorney General, of counsel herein, hereby certify that a copy of the above and foregoing brief was served on Messrs.

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